IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

OCTOBER TERM, 1984

Supreme Court, U.S.
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NO. 84-6601

CURFEW DAVIS,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit properly applied the harmless error rule to the instructions given on intent and malice in this case, so as to deny Petitioner federal habeas corpus relief?

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PART ONE

STATEMENT OF THE FACTS

Petitioner was tried and convicted of the offense of murder in the Superior Court of Troup County, Georgia, on November 12, 1974. Following his jury trial, Petitioner Curfew Davis was sentenced to death. On direct appeal to the Supreme Court of Georgia, that court affirmed Petitioner's conviction and sentence in Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976). A petition for a writ of certiorari was filed in this court and Petitioner's conviction was affirmed, but his sentence was vacated by this Court in Davis v. State, 429 U.S. 122 (1976). On remand from this Court, the Supreme Court of Georgia vacated Petitioner's death sentence and remanded the case to the trial court for a new trial as to sentence in Davis v. State, 238 Ga. 295, 232 S.E.2d 565 (1977).

On retrial of the sentencing phase, Petitioner was again sentenced to death on June 18, 1977. On direct appeal to the

Supreme Court of Georgia, Petitioner's sentence was affirmed in Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978). A petition for a writ of certiorari was denied by this Court in Davis v. Georgia, 439 U.S. 947 (1978).

After Petitioner's conviction and sentence were affirmed on direct appeal, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, in February of 1981. Following an evidentiary hearing, the state habeas corpus court entered an order on July 16, 1981 denying Petitioner state habeas corpus relief. On September 8, 1981, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and a petition for a writ of certiorari was denied by this Court on February 22, 1982.

On July 26, 1982, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was accompanied by an application for a stay of execution. The application for a stay of execution was granted on July 27, 1982. On November 19, 1982, the United States District Court entered an order finding that an evidentiary hearing was not mandated under the principles of Townsend v. Sain, 372 U.S. 293 (1973). The district court reviewed each of the allegations raised by the Petitioner and denied the petition for a writ of habeas corpus.

Petitioner filed an application for a certificate of probable cause to appeal on September 14, 1982, as well as filing a notice of appeal. The district court granted Petitioner's application for probable cause to appeal, in forma pauperis, on January 5, 1983.

Following oral argument in the United States Court of Appeals for the Eleventh Circuit, a panel of that Court entered an order dated December 27, 1983, granting habeas corpus relief based on the finding that Petitioner had been sentenced in 1977 before an unconstitutionally composed jury and remanded the case for another sentencing trial. On March 6, 1984, the

United States Court of Appeals for the Eleventh Circuit ordered that the case be heard en banc, with oral argument. On January 24, 1985, the United States Court of Appeals for the Eleventh Circuit, sitting en banc, entered an order affirming the panel's decision as to the 1977 sentencing jury, but also finding that the trial court's instructions concerning intent and malice were burden-shifting (during the 1974 guilt-innocence phase of Petitioner's trial), so as to be unconstitutional under the decision of this Court contained in Sandstrom v. Montana, 442 U.S. 510 (1979). However, the United States Court of Appeals for the Eleventh Circuit held that the instructions as to intent and malice were harmless error under the particular circumstances of this case. Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985).

Respondent Kemp filed a timely petition for a writ of certiorari in this Court, which is still pending, seeking review of the standards enunciated by the United States Court of Appeals for the Eleventh Circuit for establishing a prima facie case of jury discrimination and also seeking review of the Eleventh Circuit's standards enunciated for rebutting a prima facie case of systematic exclusion in jury selection procedures. Respondent Kemp also sought review of the application by the Eleventh Circuit Court of Appeals of the "reasonable juror test" set forth by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). However, Respondent Kemp opposes the granting of Petitioner's petition for a writ of certiorari on the question of whether the harmless error rule was properly applied in this case.

Further references to the record will be made as is necessary to address the question presented by Petitioner in his petition for a writ of certiorari.

PART TWO

REASON FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY APPLIED THE HARMLESS ERROR RULE, UNDER THE CIRCUMSTANCES OF THIS CASE.

Petitioner Davis contends that the plurality opinion of this Court in Connecticut v. Johnson, ___ U.S. ____, 103 S.Ct. 969 (1983), "casts serious doubt" on whether the doctrine of harmless error can ever be applied to a jury instruction which improperly shifts the burden of proof on the essential elements of malice and intent. Petitioner Davis argues that even if the harmless error doctrine were applicable, the alleged burden-shifting instructions given here were not harmless in Petitioner's trial. Respondent Kemp submits that this Court should not grant Petitioner Davis' petition for a writ of certiorari to review this question, as it is clear that under the circumstances of this case, the harmless error rule was properly applied by the Eleventh Circuit, assuming for the sake of argument that the instructions given on intent and malice were burden-shifting.

The United States Court of Appeals for the Eleventh Circuit found that the defense presented for Petitioner Davis was non-participation in the murder of the victim and therefore, his intent was not a contested issue, so that the doctrine of harmless error was "most appropriate" in this case. See Davis v. Kemp, 752 F.2d 1515, 1521 (1985). Respondent Kemp asserts that the application of the harmless error rule was appropriate under these circumstances and that this Court should not grant Petitioner's application for a writ of certiorari to review the applicability of the harmless error rule, but rather should grant the separately filed petition for a writ of certiorari by Respondent Ralph Kemp, seeking review, inter alia, of the constitutionality of the charge itself.

CONCLUSION

For all of the aforegoing reasons, Respondent Kemp respectfully submits that this Court should deny the petition for a writ of certiorari filed on behalf of Curfew Davis, as no substantial federal question is presented to this Court for review by means of this petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, counsel of record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a copy of the foregoing Brief for Respondent in Opposition upon the Petitioner by depositing same in the United States mail with sufficient postage affixed thereto, addressed to:

Joseph M. Nursey
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This 3rd day of May, 1985.

Susan V. Boleyn

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